No. 95-239

In The

Supreme Court of the United States

October Term, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.; RICHARD BUCHANAN; CHAD BUSH; EDWIN GREENE; RITA MATHIS; ROGER ASTERINO; and H.O.M.E., INC.,

Petitioners,

v.

CITY OF CINCINNATI; EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; and ALBERT MOORE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; and ALBERT MOORE

ROBERT H. BORK
Suite 1000
1150 17th Street, N.W.
Washington, D.C. 20036

ROBERT K. SKOLROOD
NATIONAL LEGAL FOUNDATION
6477 College Park Square
Virginia Beach, VA 23464

MICHAEL A. CARVIN*
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an amendment to the Cincinnati city charter prohibiting the City Council from enacting laws which accord protected status or preferential treatment on the basis of homosexual conduct or orientation violates a fundamental right of non-suspect groups to seek such special protections and preferential treatment.

2. Whether such an amendment to the Cincinnati city charter is rationally related to a legitimate governmental purpose.

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Respondents Equal Rights, Not Special Rights, Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore respectfully submit this brief in response to the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit filed on August 9, 1995, by petitioners Equality Foundation of Greater Cincinnati,

Inc.; Richard Buchanan; Chad Bush; Edwin Greene; Rita Mathis; Roger Asterino; and H.O.M.E., Inc.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates information concerning the factual and legal background and context of this case.

1. The History and Factual Background of Issue 3

This case is about a disagreement between the people of Cincinnati and their elected representatives on the City Council over the question of whether or not homosexuals ought to be protected under Cincinnati's civil rights laws. On March 13, 1991, the City Council enacted Ordinance No. 79-1991, commonly known as the Equal Employment Opportunity Ordinance ("EEO Ordinance"), which prohibits the City of Cincinnati, in its capacity as a public employer, from discriminating in employment matters on the basis of, among other criteria, sexual orientation. Jt. App. 668.[1] On November 25, 1992, the City Council passed Ordinance No. 490-1992, the so-called Human Rights Ordinance ("HRO"), which prohibits discrimination in employment, housing, and

[1] References to the petition for a writ of certiorari filed by petitioners will be noted as "Pet." References to the Joint Appendix before the court of appeals will be described as "Jt. App." Joint Exhibits not included in the Joint Appendix will be referred to "Jt. Exh." The full record in the district court will be referred to as "R."

public accommodations based on, *inter alia*, sexual orientation.[2] Among other things, the HRO requires that those seeking roommates in one-bedroom apartments and devoutly religious employers and landlords accept homosexuals on an equal basis. Jt. App. 416-17; 673-79.

Following the enactment of the HRO, a group of Cincinnati citizens formed an organization called "Take Back Cincinnati" for the purpose of circulating petitions and gathering signatures sufficient to place on the ballot a proposed amendment to the Cincinnati city charter. The purpose of the charter amendment is to repeal the EEO Ordinance and the HRO insofar as both ordinances grant protected status to persons on the basis of sexual orientation, and to prevent the City Council and any City officials from according such status or other preferential treatment on the basis of sexual orientation. On November 2, 1993, following a successful petition drive to place the referendum on the ballot, the citizens of Cincinnati voted to amend the city charter by adopting Issue 3. The measure, which the electorate approved by a vote of 56,416 to 34,472, or approximately 62% to 38%, reads as follows:

> NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles,

[2] The HRO makes it unlawful to discriminate against individuals on the basis of "race, gender, age, color, religion, disability status, sexual orientation, marital status, or ethnic, national or Appalachian regional origin." Jt. App. 670.

> or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Besides the HRO and EEO Ordinance, there is no evidence of any Cincinnati program or policy that would be affected by Issue 3.

2. The Proceedings in the District Court

On November 8, 1993, five individual named homosexuals and two organizations – Equality Foundation of Greater Cincinnati, Inc. and H.O.M.E., Inc. ("petitioners") – filed a complaint and motion for a preliminary injunction seeking to block the amendment from taking effect on the grounds that Issue 3 allegedly violates their rights under the Equal Protection Clause and the First Amendment to the United States Constitution. Before the hearing on the preliminary injunction, the district court permitted an organization called Equal Rights, Not Special Rights ("ERNSR") and three named individuals ("respondents") to intervene in the case as defendants. ERNSR is the successor organization to "Take Back Cincinnati," and led the campaign to have Issue 3 adopted as a charter amendment.

After a one-day hearing on the motion for a preliminary injunction, the district court granted the motion and held that the petitioners had met their burden of establishing that there is a substantial likelihood that Issue 3

violates the fundamental right of homosexuals to participate equally in the political process and infringes petitioners' expressional rights under the First Amendment. Accordingly, the district court preliminarily enjoined Issue 3 from taking effect. Pet. at 89a-105a.[3]

Believing that the case raises no genuine issues of material fact and turns instead on purely legal determinations, respondents and the City of Cincinnati filed a motion for summary judgment on all counts with the district court. Petitioners, however, refused to file a cross-motion for summary judgment, and argued instead that they needed to build a factual record, especially with regard to the allegation that homosexuals are a suspect or quasi-suspect class. The district court agreed with petitioners and denied the summary judgment motions.

On August 9, 1994, after five days of testimony, the district court permanently enjoined the charter amendment and held that Issue 3 infringes petitioners' right to participate equally in the political process; that gays, lesbians and bisexuals belong to a quasi-suspect category triggering the application of heightened scrutiny analysis under the Equal Protection Clause; and that Issue 3 gives effect to private prejudice and is insufficiently linked to any legitimate governmental interest. With respect to petitioners' First Amendment claims, the district court held that Issue 3 violates petitioners' First Amendment right to free speech and association and their right to petition the government for redress of grievances. The

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[3] On January 12, 1994, some two months after 62% of the electorate had voted in favor of Issue 3, the City Council defeated by a vote of 5-4 a measure that would have repealed the HRO.

district court also held that Issue 3 is unconstitutionally vague.[4]

The district court also opined that Issue 3 encourages private prejudice and is designed to harm homosexuals, who the court believed were politically unpopular. Pet. at 39a-40a, 40a n.7, 42a and 75a. The district court made clear that its conclusions regarding the intent and effect of Issue 3 were based solely on its text. Pet. at 75a-76a. Due to binding circuit precedent, the district court expressly eschewed any attempt to discern the voters' "intent" – prejudicial or otherwise. Pet. at 40a n.7. Although the scope and manner of the Issue 3 campaign concededly were irrelevant to the legal issues presented, the district court nonetheless found that ERNSR campaign materials were "grossly inaccurate" and "riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals." Pet. at 40a and 74a.

The only examples the district court could find to support these accusations related to its own rhetorical disagreement with the Issue 3 campaign on such matters as whether a group's inclusion in the protection of civil rights laws constitutes "special rights," whether homosexuals differ from other groups who are protected because their class is defined by sexual behavior, and

[4] The opinions of the district court are reported at 860 F. Supp. 417 (S.D. Ohio 1994) (granting permanent injunction) and at 838 F. Supp. 1235 (S.D. Ohio 1993) (granting preliminary injunction) and reprinted in Pet. at 23a-88a and 89a-105a, respectively.

whether the Supreme Court's suspect class analysis provides an appropriate guide for determining which groups are deserving of protection under civil rights laws. Pet. at 40a-41a. This is simply disagreement about legal and political rhetoric, and has nothing at all to do with "misrepresentations about homosexuals" or their lifestyle. Pet. at 40a. The reason the district court was unable to cite misrepresentations about the lifestyles or practices of homosexuals is because every public pronouncement of the ERNSR campaign dealt directly with the legal and political question of whether homosexuals should receive special civil rights protections.[5]

3. The Proceedings in the Court of Appeals

On May 12, 1995, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court and vacated the district court's permanent injunction against implementation and enforcement of Issue 3, thereby permitting the citizens of Cincinnati, instead of the City Council, to determine democratically the efficacy

[5] The undisputed evidence established that the issue of AIDS was mentioned by anyone, even indirectly, exactly four times in the campaign. The only other discussion of any aspect of homosexual lifestyle or sexuality was confined to a few pamphlets and books which, the undisputed testimony established, were distributed to no more than 20 people, were never referred to by anyone associated with ERNSR, and thus could not possibly have had any effect of voters' attitudes on Issue 3. *See* Jt. App. 418-19; 429-30; 471-73. *See also* Jt. Exh. V, at 114-16, 156-67. In all events, the undisputed evidence showed that there was no "unreliable" or false factual "data" in any of these pamphlets.

of granting protected status to homosexuals under the City's antidiscrimination laws. Pet. at 2a-22a and 23a-88a.[6] The court of appeals concluded at the outset of its opinion that since "most, if not all, of the lower court's findings . . . constituted ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and/or fact, and findings designated to support 'constitutional facts' " – such findings were subject to plenary review. Pet. 9a.[7]

Rejecting the district court's contention that Issue 3 denied petitioners their "fundamental right to equal participation in the political process," the court of appeals held that Issue 3 deprived "no one of the right to vote, nor did it reduce the relative weight of any person's vote," and enabled homosexuals to continue to vote for City Council members and to lobby those Council members concerning issues of interest. Pet. at 17a-18a. Importantly, the only effect upon the citizens of Cincinnati mentioned by the

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[6] The opinion of the court of appeals is reported at 54 F.3d 261 (6th Cir. 1995) and is reprinted in Pet. at 2a-22a. The Court of Appeals issued an Order on June 14, 1995, which is reprinted at Pet. at 1a, granting a stay of its mandate through August 10, 1995.

[7] For example, the trial judge made the following "findings": (1) Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic; (2) sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior; (3) sexual behavior is not necessarily a good predictor of a person's sexual orientation; and (4) ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals. Pet. at 37a-40a.

district court "was to render futile the lobbying of Council for preferential enactments of homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority" – an effect which the Sixth Circuit declared, "does not rise to constitutional dimensions." *Id.* The Sixth Circuit concluded "that those who opposed Issue 3 simply lost one battle of an ongoing political dispute." *Id.* Moreover, far from "altering" the political process within the City of Cincinnati, Issue 3 is a straightforward and unexceptional example of how the political process works. R. 59, at 16.

The court of appeals also rejected the district court's "novel" conclusion that homosexuals comprise a "quasi-suspect" class. Pet. at 11a. Joining "every circuit court which has addressed the issue," the Sixth Circuit concluded that "homosexuals are entitled to no special constitutional protection . . . because the conduct which places them in that class is not constitutionally protected." *Id.* The Sixth Circuit opinion rejected the notion that homosexuals are distinguished by their "sexual orientation" rather than by any particular conduct, and noted that neither Issue 3 nor other laws can successfully be drafted to burden or penalize a particular group "whose identity is defined by subjective and unapparent characteristics such as innate desires, drives and thoughts." Pet. at 13a.

Lastly, the court of appeals held that the district court "erroneously ruled that [Issue 3] did not rationally relate to any permissible purpose" and that there were legitimate governmental interests advanced in Issue 3. Pet. at 20a-21a. The court of appeals concluded that Issue 3

"furthered a litany of valid community interests," including: (1) the encouragement of associational liberty of Cincinnati citizens by eliminating exposure to the punishment mandated by the HRO against those who elected to disassociate themselves from homosexuals; (2) the reduction of governmental regulation of the private and economic conduct of Cincinnati citizens; (3) the expansion of the degree of personal autonomy and collective popular sovereignty legally permitted with respect to questions of individual conscience, private religious convictions and other profoundly personal and deeply fundamental moral issues; and (4) the return of the municipal government to a position of neutrality with respect to homosexuality. *Id.*[8] The court of appeals also properly rejected the district court's conclusion that Issue 3 violated the First Amendment and was void for vagueness. Petitioners do not seek review of these rulings or the court's rejection of their quasi-suspect class argument.

During the pendency of the Sixth Circuit appeal, on March 8, 1995, the City Council amended the HRO to eliminate any protections for "sexual orientation" discrimination, thus clarifying that neither heterosexuals nor homosexuals may seek the special protections of that law.

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[8] In addition, the court of appeals also noted, "Even if [Issue 3] is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest. *Bowers v. [Hardwick]*, 478 U.S. [186,] at 196, 106 S. Ct. 2846 [(1986)](a state criminal sodomy statute is justified as an expression of the belief of the electoral majority that homosexuality is immoral)." Pet. a' 20a n.10.

REASONS FOR HOLDING OR DENYING THE WRIT

A. The Fundamental Political Rights Issue May Be Held Pending The Court's Resolution Of *Romer v. Evans*.

Petitioners first seek review of the Sixth Circuit's determination that Issue 3 does not deny homosexuals their "fundamental right to participate equally in the political process." In *Romer v. Evans*, No. 94-1039, *cert. granted*, ___ U.S. ___, 115 S. Ct. 1092 (1995), the Court is currently reviewing the Colorado Supreme Court's determination that a similar amendment to the Colorado state constitution violates this "fundamental right." Since that case presents a similar "fundamental political rights" issue, respondents agree that it would be appropriate to hold this case pending the Court's resolution of *Romer*. It is important to note, however, that there is a significant difference between the "fundamental political rights" issue in *Romer* and that presented in this case. Consequently, while a ruling upholding Colorado's Amendment 2 necessarily demonstrates the validity of Issue 3 here, a decision striking down Colorado's Amendment 2 does not suggest any infirmity in Issue 3. A brief description of the petitioners' "fundamental political rights" theory, and the issues it raises, makes this clear.

Petitioners contend that Issue 3 denies homosexuals the right to participate politically solely because the vehicle for resolving the question whether homosexuals are entitled to special civil rights protections was a popular referendum as opposed to a decision by the local City Council. Specifically, according to petitioners, the people

of Cincinnati cannot directly resolve this important public policy issue through the Charter Amendment referendum process because, under Ohio law, the elected representatives on the City Council would thereby be prevented from granting the special protections forbidden by Issue 3. Since the City Council is thus disabled under state law from granting petitioners the laws they desire, petitioners' lobbying would be "futile" on that particular issue and thus their constitutionally-guaranteed right to lobby or participate politically would be denied. Accordingly, charter amendments and similar popular referenda cannot be used to directly resolve public policy issues affecting homosexuals, or to decide any other substantive issue which is not "neutral" with respect to any other group in American society. Under this logic, the Constitution would require that such substantive matters be left to the wholly unfettered discretion of locally elected officials because any restriction by the electorate on those officials' law-making authority would prevent affected groups from lobbying to override the popular will. Consequently, the only constitutionally permissible role for such popular referenda is to establish "neutral principles" for government structures or the political process. The plaintiffs-respondents in *Romer* make an analogous attack on the similarly-worded Amendment 2 to the Colorado state constitution.

The flaws in this argument are manifest and discussed at length in our amicus brief in *Romer*, a copy of which has been provided to petitioners here. Briefly, neither Issue 3 nor Colorado's Amendment 2 erects any obstacle whatever to homosexuals' right to lobby, vote, or

otherwise participate politically on a fully equal basis. Neither amendment even addresses, much less modifies, any aspect of the electoral, political or legislative process and homosexuals retain full and equal access to all legislators on all subjects. The only alleged "obstacle" to homosexuals' political participation is the fact that the legislators being lobbied will no longer have authority to grant homosexuals the special civil rights protections they desire. But the Constitution guarantees only equal access to legislators, it plainly does not further guarantee that those legislators' policy-making authority will remain unfettered by the contrary desires of the electorate, as expressed in a binding referendum.

Under the Federal Constitution, the electorate is entirely free to make important public policy decisions and to make those decisions binding on their employee representatives. Since our constitutional system is founded on the "critical postulate that sovereignty is vested in the people," it cannot possibly offend the Constitution when the people exercise that sovereign authority by circumscribing their representatives' power to pass certain undesirable laws. *U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 115 S. Ct. 1842, 1851 (1995).[9] Indeed, the *raison d'être* of all constitutions – local, state and federal –

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[9] *See also Martin v. Hunter's Lessee*, 14 U.S. 304, 324 (1816) ("The Constitution of the United States was ordained and established . . . as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority.").

is to have the people establish their own form of government and, as part of their social contract, to limit the permissible ends of their representatives' lawmaking efforts. *See, e.g.*, U.S. Const. amend. I ("*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to assemble, and to petition the Government for a redress of grievances.") (emphasis added). In short, since the Federal Constitution concededly does not require special civil rights laws protecting homosexuals, and since the legislatures of Colorado and Cincinnati are thus entirely free to repeal such civil rights protections, the people of Colorado and Cincinnati are necessarily also free to repeal those protections. *Thornton*, at 1858 n.19 ("We are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the state Constitution."). *See also Crawford v. Board of Educ.*, 458 U.S. 527, 538 (1982) ("[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.").

While the arguments put forth by respondents in *Romer* cannot be squared with these basic constitutional principles, it is at least possible, in the state-wide context presented in that case, to articulate some political effect stemming from Amendment 2. Specifically, in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 478-79 (1982), the Court held that, in light of Washington's highly unusual scheme of "emphatically . . . vest[ing] in local school

boards" *all* control over educational issues, a state-wide initiative to ban integrative busing "worked a major reordering of the State's educational decisionmaking process." The Court then concluded that this state-wide initiative had a potential effect on the political process because it transferred local "decisionmaking authority over the question [to] a new and remote level of government." *Id.* at 483.

Washington provides no support for the decision of the Colorado Supreme Court in *Romer* because *Washington* reaffirmed that states are "accorded the widest latitude in ordering their internal government processes" and emphasized that the *sole* constitutional deficiency in the Washington amendment was that it "rests on distinctions based on race." *Id.* at 476, 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)). In *James* – a case utterly irreconcilable with petitioners' argument – the Court had earlier established that the condemnation of popular referendum in *Hunter v. Erickson*, 393 U.S. 385 (1969), applied only if the referenda imposed unique political obstacles on *racial* minorities. *James*, at 141 ("Unlike the Akron referendum provision in *Hunter*, it cannot be said that the *James* referendum rests on distinctions based on race. . . . The present case could be affirmed only by extending *Hunter* and this we decline to do.").[10]

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[10] The *Washington* opinion also repeatedly emphasizes that *Hunter's* condemnation of popular initiatives was limited to those which imposed a racial classification burdening racial minorities. *See, e.g.*, 458 U.S. at 486 ("*Hunter* . . . rested on a principle that has been vital for over a century – that 'the core of the Fourteenth Amendment is the prevention of meaningful and

Thus, Colorado's Amendment 2 can be invalidated only if the Court overrules both *James* and the legion of cases establishing that states are free to constrain the discretion of their political subdivisions and extends *Washington* to nonracial popular referendum. But even such a stark reversal of the Court's precedent and prior devotion to popular sovereignty would still afford no basis for invalidating popular referenda, such as Issue 3, that affect only *local* communities. Even in the unique situation presented in *Washington*, the only potential effect on the political process, as noted, was that it transferred decisionmaking authority from the local to state level. Obviously, when local referenda decide questions for the relevant political jurisdiction, local decisionmaking remains at a local level. The only change is that the citizenry, rather than elected officials, make the challenged decision. That being so, even if *Washington* was expanded to condemn all state-wide referenda that interfere with local decisionmaking, such a holding still would not suggest any constitutional infirmity with purely local referenda such as Issue 3. Any such infirmity would necessarily require a different rationale; *i.e.*, that it is constitutionally impermissible for local electorates to use

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unjustified official distinctions based on *race*' ") (emphasis added and internal quotations omitted); *id.* at 474 ("Given the *racial* focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.") (emphasis added); *id.* at 474 ("As in *Hunter*, then, the community's political mechanisms are modified to place *effective* decisionmaking authority over a *racial* issue at a different level of government.") (emphasis added); *id.* at 485 ("[T]he charter amendment at issue in *Hunter* dealt in explicitly *racial* terms with legislation designed to benefit minorities 'as minorities'. . . . ") (emphasis added).

their local constitutions to limit the lawmaking authority of local representatives. As noted, such as rationale cannot conceivably be gleaned from *Washington* or any other case and is irreconcilably at odds with this Nation's political tradition of town hall meetings and constitutional tradition of a limited government with powers delegated by "We, the people." *See, e.g.*, U. S. Const. pmbl.

In short, a decision in *Romer* that Colorado's Amendment 2 does not infringe any fundamental political right necessarily means that Issue 3 is also constitutionally sound. In contrast, condemnation of Colorado's statewide constitutional amendment provides no basis for invalidating Issue 3, a purely local referendum that cannot implicate the distribution of political power between the state and local governments. Accordingly, certiorari should be granted in this case only if *Romer* strikes down Amendment 2, in order for this Court to directly resolve the separate question of whether a local citizenry's control of local representatives somehow runs afoul of the Constitution. There would be no occasion or need for the Court's review of this case, however, if Amendment 2 is upheld under this Court's well-established precedent.

B. The Lower Court's Rational Basis Judgment Does Not Warrant This Court's Review.

Petitioners ask this Court to review the lower court's finding that Issue 3 survives "rational basis" review. Review of this question is plainly not warranted, however, because the Sixth Circuit's straightforward finding concerning the rationality of Issue 3 presents no legal questions of substantial or recurring importance and

reflects no confusion, much less disagreement, among the lower federal courts.

Unlike the "fundamental political rights" issue, the decision below on Issue 3's rationality is entirely consistent with the Colorado Supreme Court's discussion of the interests served by Amendment 2. In *Evans v. Romer*, 882 P.2d 1335, 1342-44 (1994) (*"Evans II"*), the Colorado Supreme Court found that Amendment 2 serves compelling (and therefore necessarily legitimate) governmental interests in protecting religious liberty and associational privacy. Nor do petitioners point to any other lower court decisions that take any different approach to rational basis review than that employed by the Sixth Circuit. Accordingly, resolution of the fact-bound question of Issue 3's rationality is not of any general importance and is not necessary to provide guidance to the lower federal courts.

Petitioners do suggest that the Sixth Circuit's rational basis analysis conflicts with the precedent of this Court. To the contrary, the decision below was simply a straightforward application of well-established rational basis principles to a law that the court correctly found "furthered a litany of valid community interests." Pet. App. 20a. Civil rights laws protecting homosexuals necessarily deny employers and landlords their traditional freedom to associate with whomever they please and to attach significance to a sexual behavior or lifestyle that they may believe is inappropriate or sinful. By prohibiting such government coercion, Issue 3 restores citizenry's traditional freedom to associate and to act on sincerely-held religious or moral beliefs concerning the proprietary of certain behavior. Reducing government regulation

always is rational because it enhances individual freedom and preserves scarce taxpayer resources. Here, moreover, the reduction of government regulation is particularly compelling because the regulation being overturned interferes so directly with "deeply personal choices and beliefs which are necessarily imbued with questions of individual conscience, private religious convictions, and other profoundly personal and deeply fundamental moral issues." *Id.* at 20a-21a. Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider. By restoring government neutrality on this difficult and divisive moral issue, Issue 3 promotes freedom and diversity by allowing different groups in the community to hold, and act on, different views on this question. In short, Issue 3 serves all the interests that have led 42 states and the United States Congress to deny homosexuals the civil rights protections afforded many other groups.

Petitioners do not and cannot contest that enhancing associational liberty and reducing government regulation and expenditures are legitimate interests. Nor can they deny that the inexorable effect of Issue 3 is to further these interests and enhance freedom. Thus, there is no dispute that Issue 3 is rationally related to legitimate government interests, which should end any question of the amendment's validity under rational basis review. Nevertheless, petitioners suggest that the appellate court should have struck down Issue 3 because (1) these legitimate interests did not actually motivate the supporters of Issue 3, who the campaign reveals were truly motivated

by irrational "anti-gay antipathy" and (2) some of the legitimate interests supporting Issue 3 would also support a repeal of civil rights protections for groups other than homosexuals. Neither assertion is factually accurate nor relevant to any proper rational basis review, under bedrock principles already established by this Court.

First, it is black-letter law that the Court will not invalidate enactments which serve a legitimate purpose by speculating or "finding" that the legislature or electorate enacting the law is too stupid or bigoted to actually consider any such interests. To the contrary, it is well established that a law "must be upheld against equal protection challenge if there is any *reasonably conceivable* state of facts that *could* provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, ___ U.S. ___, 113 S. Ct. 2096, 2101 (1993) (emphasis added). *See also Heller v Doe*, ___ U.S. ___, 113 S. Ct. 2637, 2642-43 (1993). Thus, the subjective motivations of the laws' proponents are irrelevant to rational basis review and cannot serve to invalidate a law which objectively serves any conceivable legitimate interest. *See also Crawford*, 458 U.S. at 543-45 (declining to look beyond the purposes of the proposition "as stated in its text").

In any event, contrary to what petitioners suggest, the district court, because of binding Sixth Circuit precedent prohibiting analysis of voters' motivation outside the racial context, expressly eschewed any effort to glean from the campaign or background of Issue 3 any insight into voter purposes or motives. Pet. at 40a n.7. Rather, all the district court's negative comments about the effect and intent of Issue 3 were based on what was "inherent" in the "very structure of Issue 3" and the "very concept of

such a law." Pet. at 75a.[11] Accordingly, in conducting their *de novo* review of this purely legal question concerning Issue 3's text, the Sixth Circuit properly recognized that the district court's conclusions about Issue 3's "desire to harm politically unpopular groups" and "give effect to private prejudices" constituted nothing more than attaching pejorative labels to the concededly legitimate interests served by Issue 3. In the district court's view, private reservations about homosexuality are nothing more than "private prejudices," and to fail to affirmatively outlaw such reservations "gives effect to" such "biases" and thus, *ipso facto*, "harms" politically "unpopular" gays. Thus, the district court's and petitioners' characterization of Issue 3 is simply another (albeit quite derisive) way of saying that the amendment overturns laws prohibiting private citizens from acting on their moral reservations about homosexuals, a group that petitioners believe is not particularly popular in Cincinnati. The court of appeals properly recognized that such negative labeling simply reflects the district court's personal disagreement with the Cincinnati electorate's policy choices and that this disagreement cannot cast doubt on the validity of the legitimate interests served by Issue 3.

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[11] Of course, if the district court had made any factual findings concerning the particular circumstances of the Issue 3 campaign or the Cincinnati electorate, those findings would have no significance outside of that city and thus are unworthy of this Court 's review.

Petitioners also criticize the court below for accepting "extremely generalized" rationales in support of removing homosexuals' special civil rights protections because such justifications "could equally support" denying other groups similar protections. Pet. at 23. It is a basic principle of rational basis review, however, that the underinclusiveness of a classification affords no grounds for questioning its validity.[12] This is particularly true where, as here, the classification concerns eligibility for scarce public benefits such as special protections under civil rights laws.[13] Accordingly, contrary to petitioners' suggestion, legislatures may exclude, for example, drug addicts from the protections of civil rights laws without being constitutionally obliged also to exclude women and racial minorities from such protections, even though the freedom-enhancing reasons justifying an exclusion of drug addicts could also support excluding these other groups. In addition, homosexuality fundamentally differs

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[12] *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("If the classification has some rational basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice, it results in some in equality.") (citations and internal quotations omitted).

[13] *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]he task of classifying persons . . . for benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.") (citations and internal quotations omitted).

from other protected criteria, such as skin color and gender, because it is a behavior and thus something to which eminently reasonable people can attach negative significance. Moreover, were Issue 3 deemed to be irrational, then the United States Congress is also currently violating equal protection guarantees, because it has refused to extend to homosexual orientation or behavior the same civil rights protections it provides for race, familial status, handicap, etc., and the only justifications for such an exclusion are those which supported Issue 3.

Finally, we note that Issue 3's rationality is conclusively demonstrated by this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In that case, the Court held that a law prohibiting sodomy by homosexuals was supported by the state's legitimate interest in reflecting the majority's views that "homosexual sodomy is immoral and unacceptable." *Id.* at 196. If the government has a rational and legitimate basis for imprisoning monogamous adults whose only crime is consensual sexual behavior in the privacy of their own homes, it cannot be irrational for the government to take the far less draconian step of simply refraining from penalizing private actors who prefer not to rent their apartments to people who engage in such behavior. Indeed, it is manifestly irrational to conclude that the government *must* encourage and sanction homosexual relationships by granting them affirmative civil rights protections, but, at the same time, conclude that the government is entirely free to criminally penalize the natural, consensual results of those relationships through sodomy laws. Yet this is

precisely the state of constitutional law that would result from acceptance of petitioners' rational basis arguments.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari with respect to the fundamental rights issue should be held pending this Court's resolution of *Romer*. The petition for writ of certiorari should be denied with respect to the second question presented, concerning the rational basis of Issue 3.

Respectfully submitted,

ROBERT H. BORK
Suite 1000
1150 17th Street, N.W.
Washington, D.C. 20036

ROBERT K. SKOLROOD
National Legal Foundation
6477 College Park Square
Virginia Beach, VA 23464

MICHAEL A. CARVIN*
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record